

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD E. LEVERETTE, JR., also known as  
JAMES TAYLOR,

Defendant-Appellant.

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UNPUBLISHED

August 5, 2003

No. 239984

Wayne Circuit Court

LC No. 01-005764

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

Defendant Edward Leverette III<sup>1</sup> appeals as of right his convictions of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b, following a jury trial. Defendant received consecutive sentences of 135 months' to 20 years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction. We reverse and remand for a new trial.

After defendant was ejected from a nightclub, he and his companions were involved in a gunfight in the parking lot. Defendant's father exchanged gunfire with the owner of the club, and, subsequently, defendant shot a nightclub employee with a small pistol.

Defendant claims that the trial court erred by refusing to give a requested jury instruction on defense of others. We agree. This Court reviews claims of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). A trial court must give a jury instruction for each element of the crime or crimes charged, and when there is evidence supporting a material issue, defense, or theory, a requested jury instruction must also be given. MCR 2.516(B)(3); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if the jury instructions were somewhat imperfect, reversal is not required if the instructions addressed the substance of the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). However, where a requested instruction affects a defendant's theory of defense and was supported by the evidence, its omission may deprive the defendant of the due

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<sup>1</sup> Defendant's name was incorrectly listed in the lower court record as Edward Leverette, Jr. His correct name is Edward Leverette III.

process right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review this constitutional question de novo. *Id.*

We conclude that the failure to give the requested defense-of-others instruction deprived defendant of his due process right to present a defense. See *Kurr, supra*. The evidence at trial supported giving the requested instruction. Defendant testified that he fired a single shot into the air to scare the people who were shooting. Other evidence showed that his father was exchanging gunfire with the owner of the club, and his fiancée's brother was on the ground injured, while defendant's fiancée was inside the club recovering her car keys. Although defendant did not specifically state that his alleged warning shot was an attempt to defend his friends and father, the evidence could support such a finding by the jury and thus warranted an instruction.

The prosecution argues that because the trial court read an instruction on self-defense to the jury, defendant's rights were sufficiently protected. An instruction on self-defense, however, will not suffice where a requested instruction on defense of others is supported by the evidence. *Kurr, supra* at 327. Again, jury instructions must not exclude consideration of defenses and theories for which there is supporting evidence. *Id.* at 327-328; *Canales, supra* at 574. Therefore, because we conclude that the omission precluded jury consideration of a viable defense theory, the instructional error violated defendant's constitutional right to present a defense and was not harmless.<sup>2</sup> See *Kurr, supra* at 327; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Consequently, a new trial is warranted.

Defendant also claims that there was insufficient evidence for the jury to find that defendant possessed the specific intent to commit murder. When reviewing claims of insufficient evidence, this Court resolves all conflicts in evidence in favor of the prosecution to determine whether a rational trier of fact could have found each element of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Although it appears defendant was intoxicated when the alleged crime occurred, testimony at trial regarding his behavior and his own lucid recollection of events suggests that he was fully able to form the requisite intent. See *People v King*, 210 Mich App 425; 534 NW2d 534 (1995). Viewed in a light most favorable to the prosecution, the evidence on this record was sufficient to find intent.

Because we find that the instructional error requires reversal, we do not address defendant's claim of cumulative error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Hilda R. Gage

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<sup>2</sup> The prosecution argues that because the jury did not accept defendant's theory of self-defense, it would not have accepted the defense-of-others theory, and the error was therefore harmless. A jury could reasonably conclude, however, that a defendant acted in defense of others while not accepting that he acted in self-defense. See *People v Kurr*, 253 Mich App 317; 654 NW2d 651 (2002).